

**TRUST AGREEMENT**

Lower Passaic River Study Area Portion of the Diamond Alkali  
Superfund[ ] Site

Dated: February [ ], 2007, \_\_\_\_\_

This Trust Agreement (this "Agreement") is entered into as of [date] by and between the Settling Parties whose names and states of incorporation are set forth in Appendix A~~[name of entity funding the trust]~~ to this Trust Agreement, a ~~[insert "corporation," "limited liability company," "partnership," etc.]~~ organized and existing under the laws of the State of [ ] (the "Grantors"), and [designate a bank in NJ]~~[name of trustee]~~, a ~~[insert "corporation," "banking organization," "association," etc.]~~ organized and existing under the laws of the State of [ ] (the "Trustee").

**Whereas**, the United States Environmental Protection Agency ("EPA"), an agency of the United States ~~federal~~ government, and the Grantors have entered into an RI/FS Administrative Settlement Agreement and Order on Consent, to which this Trust Agreement is attached as Exhibit E-Consent Decree, United States of America v. [ ], Civil Action No. [ ], for the [ ] Site (hereinafter the "Settlement Agreement~~Consent Decree~~"), with respect to the Lower Passaic River Study Area Portion of the Diamond Alkali Superfund Site (the "Site");

**Whereas**, the Settlement Agreement~~Consent Decree~~ provides, in Article XXVI, that the Grantors shall provide assurance that funds will be available as and when needed for performance of the Work required by the Settlement Agreement~~Consent Decree~~;

**Whereas**, in order to provide such financial assurance, Grantors haves agreed to establish and fund the trust created by this Agreement; and

**Whereas**, the Grantors, acting through their~~its~~ duly authorized officers, haves selected the Trustee to be the trustee under this Agreement, and the Trustee has agreed to act as trustee hereunder.

**Now, therefore**, the Grantors and the Trustee agree as follows:

***Section 1. Definitions. As used in this Agreement:***

(a) The term "Beneficiary" shall have the meaning assigned thereto in Section 3 of this Agreement.

(b) The term "Business Day" means any day, other than a Saturday or a Sunday, that banks are open for business in the State of New Jersey~~[ ]~~, USA.

(c) The term "Claim Certificate" shall have the meaning assigned thereto

in Section 4(a) of this Agreement.

(d) The term “Fund” shall have the meaning assigned thereto in Section 3 of this Agreement.

(e) The term “Grantors” shall have the meaning assigned thereto in the first paragraph of this Agreement.

(f) The term “Objection Notice” shall have the meaning assigned thereto in Section 4(b) of this Agreement.

(g) The term “Settlement Agreement” shall have the meaning assigned thereto in the second paragraph of this Agreement.

(h) The term “Site” shall have the meaning assigned thereto in the first paragraph of Section 2 of this Agreement.

(i) The term “Trust” shall have the meaning assigned thereto in Section 3 of this Agreement.

(j) The term “Trustee” shall mean the trustee identified in the first paragraph of this Agreement, along with any successor trustee appointed pursuant to the terms of this Agreement.

(k) The term “Work” shall have the meaning assigned thereto in the Settlement Agreement Consent Decree.

**Section 2. Identification of Facilities and Costs.** This Agreement pertains to costs for Work required at the Site [ ] site in [ ] County, [ ] (the “Site”), pursuant to the above referenced Settlement Agreement Consent Decree.

### **Section 3. Establishment of Trust Fund.**

(a) The Grantors and the Trustee hereby establish a trust (the “Trust”), for the benefit of EPA (the “Beneficiary”), to assure that funds are available to pay for performance of the Work in the event that Grantors fails to conduct or complete the Work required by, and in accordance with the terms of, the Settlement Agreement Consent Decree. The Grantors and the Trustee intend that no third party shall have access to monies or other property in the Trust except as expressly provided herein.

(b) The Trust is established initially as consisting of funds in the amount of eight million U.S. Dollars (\$8,000,000). This initial payment shall be deposited into the Trust within 90 days from the Effective Date of the Settlement Agreement. Within one year and 90 days from the Effective Date, a second payment of ten million U.S. Dollars (\$10,000,000) shall be deposited into the Trust. Within two years and 90 days from the Effective Date, a third payment of ten million U.S. Dollars (\$10,000,000) shall be deposited into the Trust. Within three years and 90 days from the

Effective Date, a fourth payment of nine million U.S. Dollars (\$9,000,000) shall be deposited into the Trust. The timing or the amount of the second, third and fourth payment amounts may be amended pursuant to Paragraph 102 of the Settlement Agreement. Such funds, along with any other monies and/or other property hereafter deposited into the Trust, and together with all earnings and profits thereon, are referred to herein collectively as the “Fund.”

(c) The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantors, any payments necessary to discharge any liabilities of the Grantors owed to the United States.

***Section 4. Payment for Work Required Under the Settlement Agreement ~~Consent Decree~~.*** The Trustee shall make payments from the Fund in accordance with the following procedures.

(a) From time to time, the Grantors and/or their authorized representatives ~~or contractors~~ may request that the Trustee make payment from the Fund for Work performed under the Settlement Agreement ~~Consent Decree~~ by delivering to the Trustee and EPA a written invoice and certificate (together, a “Claim Certificate”) signed by an authorized representative ~~officer~~ of the Grantors ~~(or the relevant representative or contractor)~~ and certifying:

(i) that the invoice is for Work performed at the Site in accordance with the Settlement Agreement ~~Consent Decree~~;

(ii) a description of the Work that has been performed, the amount of the claim, and the identity of the payee(s); and

(iii) that the Grantors has sent a copy of such Claim Certificate to EPA, both to the EPA attorney and the EPA RPM at their respective addresses shown in this Agreement, including the date on which such copy was sent; and, in the case of electronic delivery, the date on which such copy was received by EPA as evidenced by a e-mail, facsimile, or other similar delivery methods, or in the case ~~return receipt of regular mail, (which return receipt may be written, as in the case of overnight delivery, certified mail, or other similar delivery methods, or electronic, as in the case of e-mail, facsimile, or other similar delivery methods).~~ Grantors will provide Trustee with proof of service upon EPA by overnight delivery, certified mail, or other similar delivery methods, within a reasonable time after service is complete.

(iv) the Claim Certificate shall designate the entity to which the requested payment from the Fund is to be made.

(b) EPA may object to any payment requested in a Claim Certificate submitted by the Grantors (or their authorized ~~its~~ representatives ~~or contractors~~), in whole or in part, by delivering to the Trustee a written notice (an “Objection Notice”) within fifteen ~~thirty~~ (15) ~~30~~ days after the date of EPA’s receipt of the Claim Certificate as shown

on the relevant return receipt. An Objection Notice sent by EPA shall state (i) whether EPA objects to all or only part of the payment requested in the relevant Claim Certificate; (ii) the basis for such objection, (iii) that EPA has sent a copy of such Objection Notice to the Grantors and the date on which such copy was sent; and (iv) the portion of the payment requested in the Claim Certificate, if any, which is not objected to by EPA, which undisputed portion the Trustee shall proceed to distribute in accordance with Section 4(d) below. EPA may object to a request for payment contained in a Claim Certificate only on the grounds that the requested payment is either (x) not for the costs of Work under the Settlement Agreement~~Consent Decree~~ or (y) otherwise inconsistent with the terms and conditions of the Settlement Agreement~~Consent Decree~~.

(c) If the Trustee receives a Claim Certificate and does not receive an Objection Notice from EPA within the time period specified in Section 4(b) above, the Trustee shall, after the expiration of such time period, promptly make the payment from the Fund requested in such Claim Certificate.

(d) If the Trustee receives a Claim Certificate and also receives an Objection Notice from EPA within the time period specified in Section 4(b) above, but which Objection Notice objects to only a portion of the requested payment, the Trustee shall, after the expiration of such time period, promptly make payment from the Fund of the uncontested amount as requested in the Claim Certificate. The Trustee shall not make any payment from the Fund for the portion of the requested payment to which EPA has objected in its Objection Notice.

(e) If the Trustee receives a Claim Certificate and also receives an Objection Notice from EPA within the time period specified in Section 4(b) above, which Objection Notice objects to all of the requested payment, the Trustee shall not make any payment from the Fund for amounts requested in such Claim Certificate.

(f) Any disputes with respect to requests for payments or Objection Notices shall be resolved pursuant to Section XV (Dispute Resolution) of the Settlement Agreement.

~~(g)~~ If, at any time during the term of this Agreement, EPA implements a “Work Takeover” pursuant to the terms of the Settlement Agreement~~Consent Decree~~ and intends to direct payment of monies from the Fund to pay for performance of Work during the period of such Work Takeover, EPA shall notify the Trustee in writing of EPA’s commencement of such Work Takeover. Upon receiving such written notice from EPA, the disbursement procedures set forth in Sections 4(a)-(e) above shall immediately be suspended, and the Trustee shall thereafter make payments from the Fund only to such person or persons as the EPA may direct in writing from time to time for the sole purpose of providing payment for performance of Work required by the Settlement Agreement~~Consent Decree~~. Further, after receiving such written notice from EPA, the Trustee shall not make any disbursements from the Fund at the request of the Grantors, including their~~its~~ representatives ~~and/or contractors~~, or of any other person except at the express written direction of EPA. If EPA ceases such a Work Takeover in accordance with the terms of the Settlement Agreement~~Consent Decree~~, EPA shall so notify the

Trustee in writing and, upon the Trustee's receipt of such notice, the disbursement procedures specified in Sections 4(a)-(e) above shall be reinstated.

(hg) While this Agreement is in effect, disbursements from the Fund are governed exclusively by the express terms of this Agreement.

**Section 5. Trust Management.** The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with directions which the Grantors may communicate in writing to the Trustee from time to time, except that:

(a) securities, notes, and other obligations of any person or entity shall not be acquired or held by the Trustee with monies comprising the Fund, unless they are securities, notes, or other obligations of the U.S. federal government or any U.S. state government or as otherwise permitted in writing by the EPA;

(b) the Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent such deposits are insured by an agency of the U.S. federal or any U.S. state government; and

(c) the Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

**Section 6. Commingling and Investment.** The Trustee is expressly authorized in its discretion to transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions hereof and thereof, to be commingled with the assets of other trusts participating therein.

**Section 7. Express Powers of Trustee.** Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) to make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(b) to register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the U.S. federal government or any U.S. state government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are

part of the Fund; and

(c) to deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the U.S. ~~federal~~ government.

**Section 8. Taxes and Expenses.** All taxes of any kind that may be assessed or levied against or in respect of the Fund shall be paid from the Fund. All other expenses and charges incurred by the Trustee in connection with the administration of the Fund and this Trust shall be paid by the Grantors.

**Section 9. Annual Valuation.** The Trustee shall annually, no more than thirty (30) days after the anniversary date of establishment of the Fund, furnish to the Grantors and to the Beneficiary a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The annual valuation shall include an accounting of any fees or expenses levied against the Fund. The Trustee shall also provide such information concerning the Fund and this Trust as EPA may request from time to time.

**Section 10. Advice of Counsel.** The Trustee may from time to time consult with counsel with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder; provided, however, that any counsel retained by the Trustee for such purposes may not, during the period of its representation of the Trustee, serve as counsel to the Grantors.

**Section 11. Trustee Compensation.** The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing with the Grantors and as notified in writing to the Beneficiary.

**Section 12. Trustee and Successor Trustee.** The Trustee and any replacement Trustee must be approved in writing by EPA and must not be affiliated with any of the Grantors. The Trustee may resign or the Grantors may replace the Trustee, but such resignation or replacement shall not be effective until the Grantors have appointed a successor trustee approved in writing by EPA and this successor accepts such appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantors cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to EPA or a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the Fund and the Trust in a writing sent to the Grantors, the Beneficiary, and the present Trustee by certified mail no less than 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 8.



**Section 13. Instructions to the Trustee.** All instructions to the Trustee shall be in writing, signed by such persons as are empowered to act on behalf of the entity giving such instructions. The Trustee shall be fully protected in acting without inquiry on such written instructions given in accordance with the terms of this Agreement. The Trustee shall have no duty to act in the absence of such written instructions, except as expressly provided for herein.

**Section 14. Amendment of Agreement.** This Agreement may be amended only by an instrument in writing executed by the Grantors and the Trustee, and with the prior written consent of EPA.

**Section 15. Irrevocability and Termination.** This Trust shall be irrevocable and shall continue until terminated upon the earlier to occur of (a) ~~receipt of EPA's notice of completion of work the written direction of EPA to terminate, consistent with the terms of~~ pursuant to the Settlement Agreement Consent Decree and (b) the complete exhaustion of the Fund comprising the Trust as certified in writing by the Trustee to EPA and the Grantors. Upon termination of the Trust pursuant to Section 15(a), all remaining trust property (if any), less final trust administration expenses, shall be delivered to the Grantors.

**Section 16. Immunity and Indemnification.** The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantors or the EPA issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantors from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct made by the Trustee in good faith in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantors fails to provide such defense.

**Section 17. Choice of Law.** This Agreement shall be administered, construed, and enforced according to the laws of the State of New Jersey.

**Section 18. Interpretation.** As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

**Section 19. Notices.** All notices and other communications given under this agreement shall be in writing and shall be addressed to the parties as follows or to such other address as the parties shall by written notice designate:

(a) If to the Grantors, to William H. Hyatt, Jr., Coordinating Counsel, LPRSA Cooperating Parties Group, c/o K&L Gates, One Newark Center, Newark, N.J. 07102, or william.hyatt@klgates.com.

(b) If to the Trustee, to [\_\_\_\_\_].

(c) If to EPA, to Alice Yeh EPA Region \_\_\_\_\_, Remedial Project Manager

for the Site] at 290 Broadway, New York, NY 10007, or yeh.alice@epamail.epa.gov, and  
Sarah P. Flanagan, Assistant Regional Counsel, New Jersey Superfund Branch, US~~EPA~~  
Region 2~~—~~, at 290 Broadway, New York, NY 10007, or  
flanagan.sarah@epamail.epa.gov~~Office of Regional Counsel contact for the Site~~, at  
[ ]].

[Remainder of page left blank intentionally.]



**In Witness Whereof**, the parties hereto have caused this Agreement to be executed by their respective officers duly authorized and attested as of the date first above written:

**GRANTOR**

[Signature of Grantor]

[Name and Title]

State of \_\_\_\_\_

County of \_\_\_\_\_

On this [date], before me personally came [name of Grantor official], to me known, who, being by me duly sworn, did depose and say that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

**TRUSTEE**

[Signature of Trustee]

[Name and Title]

State of \_\_\_\_\_

County of \_\_\_\_\_

On this [date], before me personally came [name of Trustee official], to me known, who, being by me duly sworn, did depose and say that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]